MOHD NAZARI AB MAJIT *a*

v.

TAN KEO HOCK & ANOR

HIGH COURT MALAYA, MELAKA *b*
AUGUSTINE PAUL J
[CIVIL APPEAL NO: 12-20-97]
11 JULY 1998

EVIDENCE: *Documentary evidence - Agreed bundle - Document admitted with formal proof dispensed with - Whether party agreeing to admission entitled to challenge contents of document - How contents of document may be challenged* *c*

EVIDENCE: *Hearsay - Document - Truth of contents of document - Whether document contained an admission - Whether admissions amounted to exception to rule against hearsay - Evidence Act 1950, ss. 17, 18, 21* *d*

This was a case involving a road accident between one Mohd Nazari, riding a motor-cycle, and the first defendant, driving a car owned by the second defendant. The plaintiff suffered severe brain damage and was paralysed and claim for damages was brought by his father against the two defendants. The *e* Sessions Judge dismissed the plaintiff's claim with costs, stating that the latter had failed to show that it was the negligence of the defendants that caused the accident. The plaintiff appealed.

The issue for consideration was in relation to the admissibility of a police report in the agreed bundle of documents. The report was based on the *f* information provided for by the first defendant.

Held:

[1] Where a document is admitted with formal proof being dispensed with, the party agreeing to its admission does not thereby accept the truth of the contents. He is entitled to challenge the contents of the document by way of cross-examination or otherwise – cross-examination being of other witnesses and not the maker of the document. Since formal proof of the document has been dispensed with, the maker need not be made available *h* for cross-examination.

[2] The inclusion of the police report in the agreed bundle of documents does not affect its admissibility in evidence as the parties had agreed to dispense with its formal proof. The evidentiary effect of the report however was another matter. *i*

[3] As the police report was hearsay, it was inadmissible if it was wholly exculpatory. On the other hand, if there were any admissions in the report, they were admissible as an exception to the hearsay rule pursuant to ss. 17, 18, 21 of the Evidence Act 1950. In this case, the police report was not wholly exculpatory. It contained an admission by the first defendant. A finding of contributory negligence therefore could be made.

[Appeal allowed.]

Cases referred to:
Baker v. Longhurst & Sons Ltd [1933] 2 KB 461 ***(refd)***
Casewell v. Powell Duffryn Associated Collieries Ltd [1940] AC 152 ***(cit)***
Gibby v. East Grinstead Gas & Water Co [1944] 1 All ER 358 ***(cit)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(dist)***
Kerry v. Keighley Electrical Engineering Co Ltd [1940] 3 All ER 399 ***(cit)***
KR Taxi Service Ltd & Anor v. Zaharah & Ors [1969] 1 MLJ 49 ***(cit)***
Lionel Edwards Ltd v. State of West Bengal AIR [1967] Cal 191 ***(refd)***
M Ratnavale v. S Lourdenadin [1988] 2 MLJ 371 ***(cit)***
Ng See Hem v. Lim Ah Hooi [1950] MLJ 280 ***(cit)***
Sharpe v. S Ry [1925] 2 KB 311 ***(cit)***
Tan Keng Kuan v. Lim Chen Teik & Ors [1965] 1 MLJ 116 ***(cit)***
Tiong Ing Chiong v. Vaneite [1984] 2 MLJ 170 ***(cit)***

Legislation referred to:
Evidence Act 1950, ss. 17, 18, 21, 58

Other sources referred to:
Charlesworth on Negligence, 8th edn, p 186
Sarkar on Evidence, 14th edn, vol 1, pp 914-915

For the appellant - Kesavan P Krishnan; M/s Kesavan & Assoc
For the respondent - Suresh G Sreedharan; M/s RK Nathan & Co

Reported by Mariette Peters-Goh

JUDGMENT

Augustine Paul J:

On 22 March 1995 one Mohd Nazari bin Ab Majit was riding motor cycle No MAD 3580 along Jalan Bacang, Melaka when he was involved in an accident with motor lorry No JCS 6379 driven by the first defendant and owned by the second defendant. He suffered severe brain damage in the accident and was paralysed. This claim for damages was brought by his father and next friend Ab Majit bin Kadir against the two defendants. At the trial of the action before the Sessions Court the plaintiff was not able to give evidence due to his medical condition. The plaintiff's case was closed after

six witnesses had given evidence. Two of them, PW1 and PW5, gave evidence on the medical condition of the plaintiff. Two police personnel, PW2 and PW3, tendered in evidence the sketch plan and key and photographs of the two vehicles involved in the accident. PW2 said that when he arrived at the scene there were no vehicles on the road. He found glass fragments closer to the centre white line of the road as one faces Bacang. The road was straight. He also said that there were no signs of any brake marks at the scene. The front part of the motor cycle was damaged while the damage to the lorry was at the front right side. Ab Majid bin Kadir was only able to say that on the day in question he had asked his son to buy a paint brush at about 6pm. At about 6.30pm he received a telephone call informing him of the accident. He went straight to the hospital where he found his son in a coma. His son is unable to talk and move till today. At the close of the plaintiff's case the defendants closed their case without calling any evidence.

In her grounds of judgment the learned Sessions Court judge said that the plaintiff has failed to show that it was the negligence of the defendants that caused the accident. She said that there was no independent evidence to show how the accident happened. The evidence of the investigation officer also did not assist the court. He came to the scene after the accident when the vehicles involved had been removed. He only found glass fragments at the centre of the road. The plaintiff's father did not know how the accident happened. There was no evidence before the court to show the direction in which the vehicles were travelling. Accordingly, she dismissed the plaintiff's claim with costs. This appeal is by the plaintiff against that order.

The argument before me of both counsels centred on the admissibility of a police report in the agreed bundle of documents. The report was recorded by lance corporal 96794 based on what the first defendant told him. The outcome of the plaintiff's claim depends on this report in the absence of any other evidence to establish negligence on the part of the defendants. The material parts of the report read as follow:

> Pada 22.03.95 jam lebihkurang 0645 petang setelah saya parking lori saya di kiri jalan di Batu 2 Jalan Tun Perak Bacang, Melaka. Dan apabila saya hendak keluar dengan memandu lori saya hendak balik ke Johor di masa itu saya lihat tiada kenderaan yang datang dari arah belakang dan terus keluar, apabila lori yang saya pandu keluar dan naik ke atas jalan tiba-tiba sebuah motosikal yang datang dari arah belakang telah melanggar terus melanggar di bahagian tengah lori saya dan tangki minyak kemek lain kerosakan tak tahu lagi. Dan saya bawa mangsa ke Hospital Melaka. Butir-butir lori yang saya pandu jenis Toyota JSC 6379 saya mempunyai lesen memandu kelas B2, D, E2 N. siri 1645524 dan C 752125 tarikh tamat 04.12.99. PSV lesen no. 803394 N. Lencana 693588 tarikh tamat 10.10.95. Dikeluarkan oleh JPJ Kuala Lumpur. Dan lencana PSV saya telah tercicir semasa membawa mangsa tersebut ke Hospital Melaka.

At the first hearing of the appeal before me both parties agreed that the police report was included in Part B of the agreed bundle of documents with formal proof of it being dispensed with subject to cross-examination. Learned counsel for the respondent also agreed that it was his responsibility to produce the defendant for cross-examination. On the next hearing of the appeal learned counsel for the appellant said in his submission that at the trial in the court below his reference to this report was disallowed by the learned Sessions Court judge. He said that as formal proof of the police report had been dispensed with by the parties it is admissible in evidence without the need to call its maker. He added that if the defendants had not agreed to the inclusion of this report in the agreed bundle then he would have called the maker of the report to tender it in evidence. In support of this proposition he relied on *Ng See Hem v. Lim Ah Hooi* [1950] MLJ 280 and *M Ratnavale v. S Lourdenadin* [1988] 2 MLJ 371. He contended, in the alternative, that the doctrine of *res ipsa loquitor* is applicable on the facts of this case. Learned counsel for the respondent having first submitted that the police report can only be tendered though its maker later said that the effect of the report being in Part B of the agreed document meant that formal proof is dispensed with and that the contents are disputed. He then went on to say that when formal proof is dispensed with it only means that the recording officer's presence is dispensed with.

An agreed bundle of documents in a civil action is a useful tool in expediting the hearing process. Parties may agree to the inclusion of documents in such a bundle with or without conditions. The evidentiary value of a document in an agreed bundle of documents would therefore depend on the condition subject to which it was included in the bundle. In this regard I refer to *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 where Peh Swee Chin FCJ in delivering the majority judgment of the Federal Court said at p. 521:

> It goes without saying that either or any of the parties to any particular civil case can effectively object to the inclusion of any document in an agreed bundle of documents, and further he is at liberty to impose conditions upon which any particular document is included therein, if he agrees in the first place to such inclusion.
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> IN THE ABSENCE OF ANY EXPRESS CONDITIONS REGARDING THE INCLUSION OF ANY OF THE DOCUMENTS IN THE AGREED BUNDLE OF DOCUMENTS, speaking for myself, I have always taken the agreed bundle in a civil case to mean as follows without meeting any contradiction or any serious contradiction from any member of the Bar or any appellate court in my decades at the Bar or on the Bench.

First and foremost, the agreed bundle of documents means that the documents therein are authentic and they do exist, therefore they require no proof of their authenticity by calling e.g, their makers.

Secondly, the truth of contents of any of the documents in the agreed bundle of documents is always not admitted unless the contrary is indicated directly or indirectly and such truth of such contents is liable to be challenged in court at the instance of either of the parties.

Thirdly, such documents therein do not form automatically a part of the evidence of the case in question *ipso facto*, but any of such documents does become part of such evidence if it is read or referred to by either of the parties, wholly or partly, at length or in a briefest of mention, either in examination of any witness, in submission at any stage or even on any unilateral drawing of court's attention to it by either of the parties at any time before the conclusion of the case.

Fourthly, at the end of the whole case, the truth of the contents of any of the document is up to the court to determine, regard being had, *inter alia*, to any absence of challenge by either of the parties on any part of the document and similarly the question of weight, eg, either great or no weight to be given to any part of any document is also a matter for the trial court, which considers the documents including any "written hearsay" contained therein. The court, may refuse to give any weight at all to any document, but then it is accountable like in other matters, to the parties and to the appellate for reasons for such refusal.

On the effect of a document in an agreed bundle of documents where formal proof of its execution has been dispensed with useful reference may be made to *Lionel Edwards Ltd v. State of West Bengal* AIR [1967] Cal. 191 where AK Das J said at p. 194:

Documents are either proved by witnesses or marked on admission. When it is marked on admission without reservation, the contents are not only evidence but are taken as admitted the result being, the contents cannot be challenged either by way of cross-examination or otherwise. In respect of documents marked on admission dispensing with formal proof, the contents are evidence, although the party admitting does not thereby accept the truth of the contents and is free to challenge the contents by way of cross-examination or otherwise. In this connection our attention was drawn to a case reported in AIR 1954 Bom 305, *Madholal Sindhu v. Asian Assurance Co Ltd.*, where Bhagawati, J pointed out that where the correctness of the contents of a document produced in Court is in issue that should be proved by calling the executor of the document as a witness. The learned judge pointed out that the issue before him was not whether the documents were written by X and that if that had been the only issue, the proof of the signatures, or the handwriting could have been enough. What was in issue however before the learned judge was apart from X having signed or written the documents, whether the contents of the

> documents were correct. That could not be proved by a witness who had no personal knowledge whatever about the contents. The view propounded here is not in conflict with the view I have taken in the case before us. The contents become evidence on being marked on admission, formal proof being dispensed with, whatever might be their evidentiary value and the evidentiary value has to be judged in the light of other evidence and circumstances.

It is therefore clear that where a document is admitted with formal proof being dispensed with the party agreeing to its admission does not thereby accept the truth of the contents. He is entitled to challenge the contents of the document by way of cross-examination or otherwise. I must make it clear that the cross-examination that I have just referred to is cross-examination of other witnesses and not the maker of the document. It cannot refer to the maker of the document as formal proof of the document has been dispensed with which means that he need not be made available for cross-examination. If he is required to be produced for cross-examination then the object of dispensing with formal proof of the document will be defeated. If cross-examination of the maker is required in order to establish the truth of the contents of the document then the party requiring such cross-examination ought not to have agreed to dispense with formal proof. Where he agrees to dispense with formal proof the other party is not obliged to produce the maker for cross-examination. In that event the evidentiary value of the document is determined by cross-examination of other witnesses produced by either party or by calling other witnesses on the issue concerned and the circumstances of the case. The reservation of a right to cross-examine when there is agreement to dispense with formal proof of a document is therefore superfluous as it is implicit in such an agreement. In the light of what I have said thusfar the dispensation of formal proof of the police report with a right to cross-examination in this case can only refer to cross-examination of other witnesses called by the parties for the purpose of challenging the truth of the contents of the report. The sequence of events in this case reveals that the defendants closed their case without calling any evidence. They have therefore deprived themselves of the opportunity of challenging the truth of the contents of the police report. Furthermore, by agreeing to the inclusion of the police report in the agreed bundle of documents they have thereby effectively prevented the plaintiff from calling the maker of the report to tender it in evidence which he is entitled to do so.

Thus the inclusion of the police report in the agreed bundle of documents does not affect its admissibility in evidence as the parties have agreed to dispense with its formal proof. However, the evidentiary effect of the police report is another matter. It is a document admitted in evidence by consent of the parties before the hearing in accordance with s. 58 of the Evidence Act 1950. As *Sarkar on Evidence* 14th Edn Vol 1 says at pp. 914-915:

> But the object of s. 58 is only to use the admission pertaining to the execution of a document as an alternative to its formal proof and not to use such an admission as ever to circumvent other provisions of law restricting or prohibiting the use of such document. When the document is not duly stamped under s. 35 of Stamp Act a court is not competent to admit it in evidence and give relief on its basis merely on the ground that its execution has been admitted by the party against which relief is sought (*Dewan Chand v. Jay Pee & C, A* [1977] J & K 61; *Mg Po v. Chettyar Firm*, A [1935] R 282).

In determining the evidentiary effect of the police report in this case useful reference may be made to the minority judgment of Gopal Sri JCA in *Jaafar Shaari* where his Lordship said at p. 531:

> Having considered the arguments of counsel on both sides and the authorities cited by them, I am of opinion that the following propositions may be taken as well-settled:
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> (1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon by the terms of the agreement between the solicitors having conduct of an action. If by their agreement they dispense with formal proof and also agree to the truth of the contents of a particular document, then its contents may be relied upon either side to establish or to disprove a fact in issue. On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used. See, *Yew Lean Finance Development (M) Sdn Bhd v. Tan Gin Thong (supra)*.
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> (2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. See, *Henry Trading Co Ltd v. Harun* [1966] 2 MLJ 281; *Borneo Co (M) Sdn Bhd v. Penang Port Commission* [1975] 2 MLJ 204.
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> (3) A party may rely upon an admission made by his opponent in a police report (whether or not it be first information) or other documentary hearsay included in an agreed bundle on the condition that only its formal proof is dispensed with: *M.A. Clyde v. Wong Ah Mei (supra)*; *Tan Song Sou v. Goh Ya Tian (supra)*. However, if such a document is wholly exculpatory of the maker, then it is pure hearsay and inadmissible: *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175; *Chuah Ah Chee & Ors v. Gurdial Singh & Anor (supra)*. The reasons for its inadmissibility appear sufficiently in the judgment of Ali FJ in *Wong Thin Yit* and that of Edgar Joseph Jr J in *Chuah Ah Chee*. They therefore require no reiteration here.

I pause to observe that this case must be distinguished from *Jaafar Shaari* where the police report in the agreed bundle of documents was agreed by the parties to "... be tendered through its maker dispensing with formal proof." The Federal Court, by a majority, held that the words "dispensing with formal proof" contradicted the words "tendered through its maker." That is clearly so as the use of the latter phrase rendered the former phrase otiose. Accordingly the majority of the Federal Court held that the police report was inadmissible with the result that its evidentiary value did not arise for consideration. The majority judgment therefore does not affect the law enunciated in the minority judgment which proceeded on the basis that the report is admissible.

As the police report in this case is hearsay it is inadmissible if it is wholly exculpatory. On the other hand if there are any admissions in the report they are admissible as an exception to the hearsay rule pursuant to ss. 17, 18 and 21 of the Evidence Act 1950. It is my view that the police report in this case is not wholly exculpatory. It contains an admission by the first defendant that when he moved his lorry to the road a motor cycle knocked into the side of his lorry. In the report the first defendant had stated that he had parked his motor lorry at the side of the road. He said that when he found that there were no vehicles from the rear he moved his lorry. Suddenly a motor cycle came from the rear and knocked into the side of his lorry. If in fact there were no vehicles at his rear when he moved the lorry the accident would not have happened. The fact that the motor cycle knocked into him when he moved the lorry only means that the motor cycle was already close to him at that point of time. The motor cycle could not have appeared from nowhere. The first defendant had therefore driven across the path of oncoming traffic. It is a grave fault in motor driving to turn a vehicle across the general route of traffic without first ascertaining that there is a clear passage available (see *Tan Keng Kuan v. Lim Chen Teik & Ors* [1965] 1 MLJ 116). A driver in turning across the path of oncoming traffic is not absolved from the duty to see that he must not endanger approaching traffic (see *KR Taxi Service Ltd & Anor v. Zaharah & Ors* [1969] 1 MLJ 49). The driver of a vehicle who is turning across the path of oncoming traffic is under a duty to allow them to pass before turning (see *Tiong Ing Chiong v. Vaneite* [1984] 2 MLJ 170). The absence of brake marks on the road shows that the rider of the motor cycle did not attempt to stop his motorcycle in order to avoid the accident with the result that he is guilty of contributory negligence for not having taken evasive steps to avoid the accident. Even though the defendants did not call any evidence apart from the inclusion of their report in the agreed bundle of documents a finding on contributory negligence can still be made. In this regard *Charlesworth on Negligence* 8th Edn. says at p. 186 that in order to

discharge the burden of proof on contributory negligence it is not necessary for the defendant to give evidence about such matters as contributory negligence can be inferred from the evidence adduced already on the plaintiff's behalf (see *Sharpe v. S Ry* [1925] 2 KB 311; *Baker v. Longhurst & Sons Ltd* [1933] 2 KB 461; *Kerry v. Keighley Electrical Engineering Co Ltd* [1940] 3 All ER 399) or from the primary facts, so found by the court, on a balance of probabilities (see *Caswell v. Powell Duffryn Associated Collieries Ltd* [1940] AC 152, 169; *Gibby v. East Grinstead Gas & Water Co* [1944] 1 All ER 358). Accordingly, I apportioned liability and found the defendants 75% and the plaintiff 25% negligent. With regard to the award on damages the parties agreed to be bound by the assessment made by the learned Sessions Court judge. I therefore allowed the appeal with costs and interest in these terms.

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